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Supreme Court, U.S.
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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WILLIE LLOYD TURNER,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	ii
QUESTIONS PRESENTED	1
PROCEEDINGS BELOW	1
CONSTITUTIONAL PROVISIONS INVOLVED.	2
STATUTORY PROVISION INVOLVED.	2
STATEMENT OF FACTS.	3
ARGUMENTS	
ARGUMENT I	6
ARGUMENT II.	14
CONCLUSION.	22
MAILING CERTIFICATE	23
APPENDIX.	24
OPINION OF THE SUPREME COURT OF VIRGINIA . .	1
ORDER AFFIRMING CONVICTION AND SENTENCE. . .	23
ORDER DENYING PETITION FOR REHEARING	24

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TABLE OF AUTHORITIES

Page

United States Supreme Court Decisions:

Adams v. Texas, ___U.S.___, 65 L.Ed.2d 581 (1980) 6,7,12,13

Boulden v. Holman, 394 U.S. 478 (1969). 6,7

Godfrey v. Georgia, ___U.S.___, 64 L.Ed.2d 398, (1980) 17,18,20,21

Gregg v. Georgia, 428 U.S. 153 (1976) 10,11,13,16,20,21

Jurek v. Texas, 428 U.S. 262 (1976) 12

Lockett v. Ohio, 438 U.S. 586 (1978). 7

Maxwell v. Bishop, 398 U.S. 262 (1970). 6

Witherspoon v. Illinois, 391 U.S. 510 (1968). . . 6,7,8,9,10,11,12

Other Cases:

James Briley v. Commonwealth, 221 Va. ___, 221, V.R.R. 568 (1980). 16

Clark v. Commonwealth, 220 Va. 211, 257 S.E.2d 784 (1979) 21

Giarratano v. Commonwealth, 220 Va.___, 266 S.E.2d 94 (1980). 16

Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976) 17,19

Martin v. Commonwealth, 221 Va.___, 221 V.R.R. 433 (1980) 21

Mason v. Commonwealth, 219 Va. 1091 (1979). . . . 16

Smith v. Commonwealth, 219 Va. 455 (1979) 15,16,18

Stamper v. Commonwealth, 220 Va. 260 (1979) . . . 16

Turner v. Commonwealth, 221 Va.___, 221 V.R.R. 512 (1980) 15,16

Waye v. Commonwealth, 219 Va. 683 (1979). 16

Statutes:

Ga. Code Ann. §27-2534.1(b)(7) 16

Va. Code Ann. §19.2-264.2 11,14,18
§19.2-264.4 11,14,19

Other Authorities:

Comment, 1968 Duke L.J. 283 9

QUESTIONS PRESENTED

1. Did the trial Court's action in excluding venireman Samuel Cypress for cause deprive your Petitioner of his right to a jury trial for the reasons set forth by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968), in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

2. In holding that the actions attributed to Petitioner constituted an "aggravated battery," did the trial Court and the Virginia Supreme Court apply an unconstitutional construction of Va. Code Ann. §19.2-264.2 (1977 Cum.Supp.), in violation of the Eighth and Fourteenth Amendments to the United States Constitution?

PROCEEDINGS BELOW

Your Petitioner was convicted of capital murder in the Circuit Court for the County of Southampton on December 4, 1979; the jury recommended the death penalty on December 6, 1979. The Honorable James C. Godwin imposed the death sentence on February 6, 1979. Petitioner exercised his right of automatic appeal to the Supreme Court of Virginia, which Court affirmed Petitioner's conviction in an opinion rendered on November 26, 1980. Turner v. Commonwealth, 221 Va. ___, 221 V.R.R. 512 (1980). Petitioner timely filed a Petition for Rehearing, which was denied by the Supreme Court of Virginia on January 16, 1981.

This Court has jurisdiction to review the judgment of the Supreme Court of Virginia pursuant to 28 U.S.C. §1257(3), in that your Petitioner alleges (1) a violation of his right to a jury trial, guaranteed by the Sixth and the Fourteenth Amendments to the United States Constitution, and (2) that the imposition of the death penalty upon your Petitioner would constitute cruel and unusual punishment,

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in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

The Eighth Amendment of the United States Constitution states as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment to the United States Constitution states, in pertinent part, as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law . . .

STATUTORY PROVISION INVOLVED

Va. Code Ann. §19.2-264.2 (1977 Cum.Supp.) states as follows:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

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STATEMENT OF FACTS

According to the evidence adduced at trial, the offense of which your Petitioner was convicted occurred as follows:

On July 12, 1979, Willie Lloyd Turner walked into Smith Jewelers in Franklin, Virginia, brandishing a sawed-off shotgun. He demanded that Jack Smith fill up some bags with jewelry; Smith triggered the silent alarm and moments later, Alan D. Bain, Jr., a police officer in the City of Franklin, entered the jewelry store. Turner disarmed him, and told him to stand in the back of the store with the other customers who had been in the store when this robbery began. As Smith filled bags with jewelry, Turner, hearing police sirens, became panicky. Turner fired Bain's service revolver at the back wall; as the sirens continued, Turner fired the revolver at Smith, grazing his scalp and causing only a superficial wound. Smith then fell to the floor. Turner told Officer Bain that if he heard any more sirens or saw any more police officers, he was going to start killing.

In the confusion, one customer and one employee were able to sneak out the front door. Turner apparently became panicky again, and shot Smith, who was lying on the floor, twice in the back. According to the medical examiner, either of the two bullets would have been fatal. Officer Bain testified that the two fatal shots were fired "in rapid succession." After the two shots were fired, Officer Bain attacked Turner, disarmed him, and placed him under arrest.

Turner was brought to trial on December 3, 1979 and was found guilty on December 4, 1979 of numerous related non-capital felonies, and capital murder, to wit: murder in the commission of a robbery while armed with a deadly weapon, in violation of Va. Code Ann. §18.2-31. On December 5, 1979, the sentencing phase of the trial began, and on December 6, 1979, the jury recommended the death penalty, which was then imposed on February 6, 1980.

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At trial, defense counsel made repeated motions for extensive voir dire, including a request to question the veniremen directly, pursuant to Va. Code Ann. §8.01-358. These motions were denied. The Court asked two basic questions of each juror concerning his or her feelings about the death penalty:

1. "Do you have any religious or conscientious scruples or objections against the imposition of the death penalty?"

2. "Do you feel that the death penalty should be imposed in every murder case, regardless of the facts or circumstances?"

On those occasions when the Court felt that the answers to those two questions revealed grounds for objection, the Court would ask further questions of that venireman to determine whether the venireman should be struck for cause.

When Samuel Cypress was examined on voir dire, the following colloquy ensued:

> Now, Mr. Cypress, do you have any religious or conscientious scruples or objections against the imposition of the death penalty?
>
> MR. CYPRESS: Well, really, I don't go for the death penalty.
>
> THE COURT: Can you say yes or no to that question?
>
> MR. CYPRESS: No.
>
> THE COURT: Or yes?
>
> MR. CYPRESS: Do I have any objection?
>
> THE COURT: Yes.
>
> MR. CYPRESS: Yes.
>
> THE COURT: Is your objection to the death penalty absolute?
>
> MR. CYPRESS: Well, I would say yes.
>
> THE COURT: Could you in a proper case impose the death penalty?
>
> MR. CYPRESS: Well, I can't see where it helps any.

(R.134)

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The Commonwealth then moved to strike Mr. Cypress; the defense objected, suggesting that Mr. Cypress be called back and asked to answer the final, crucial question with a "yes-or-no" answer. The Court declined, and struck Mr. Cypress for cause (R. 136).

The federal question presented by the exclusion of Samuel Cypress is a Sixth Amendment issue, under the rule of Witherspoon v. Illinois, 391 U.S. 510 (1968). There is no comparable rule under Virginia law, although various decisions of the Virginia Supreme Court have applied Witherspoon. Neither Witherspoon nor the Sixth Amendment was mentioned specifically during arguments at trial on the scope of voir dire, although it is apparent throughout that the objections and motions to strike for cause are based upon Witherspoon. (See, e.g., R. 122, 136).

After trial, and before sentence was imposed, defense counsel moved for a new trial. The motion was based, inter alia, on the exclusion of Samuel Cypress, citing Witherspoon and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. (R. 500-02.) The motion for a new trial was denied (R. 546-48.) The exclusion of Samuel Cypress was Assignment of Error 10 on appeal to the Supreme Court of Virginia, and the issue was argued to that court. The Virginia Supreme Court rejected Petitioner's arguments.

Petitioner's second claim is that the imposition of the death penalty in this case would constitute cruel and unusual punishment under the Eighth Amendment and this Court's decision in Godfrey v. Georgia, ___ U.S. ___, 64 L.Ed.2d 398 (1980). This claim relates to Petitioner's Assignments of Error 25, 27, 29, and 30. At trial, defense counsel referred to the "outrageously or wantonly vile, horrible or inhuman . . ." aggravating circumstance by the label of "atrociousness." After the Commonwealth presented its evidence at the sentencing phase of the trial, defense counsel moved to strike the Commonwealth's evidence as to "atrociousness," asking

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the court to remove that aggravating circumstance from the consideration of the jury (R. 351-58.) The Court overruled the motion. On the motion for a new trial, argued before sentencing, defense counsel asked that the death penalty not be imposed because there was insufficient evidence of "atrociousness" (R. 519-23). The trial court overruled the motion (R. 546-48).

This issue was argued before the Virginia Supreme Court, under two different lines of authority:

(1) The Court's power under Va. Code Ann. §17-110.1 to commute a death sentence when the sentence would be disproportionate (the argument advanced in Appellant's Opening Brief, filed with the Virginia Supreme Court on May 19, 1980); and

(2) The imposition of the death penalty would violate the Eighth and Fourteenth Amendments to the United States Constitution, as analyzed in Godfrey v. Georgia, ___ U.S. ___, 64 L.Ed.2d 398 (May 19, 1980) (advanced in Appellant's Reply Brief). The Supreme Court of Virginia rejected both arguments.

ARGUMENT I

THE TRIAL COURT'S ACTION IN DISQUALIFYING JUROR SAMUEL CYPRESS VIOLATED THIS COURT'S RULE IN WITHERSPOON v. ILLINOIS, AND DENIED YOUR PETITIONER HIS RIGHT TO A JURY TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Witherspoon v. Illinois, 391 U.S. 510, 522 (1968), this Court held that:

> A sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

Witherspoon, and the cases following it (See, e.g., Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970); and Adams v. Texas, ___ U.S. ___, 65 L.Ed.2d 581 (1980)) state that the only veniremen who could have been excluded were

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> those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Witherspoon, supra, at 522-23, n.21 (emphasis in original). Petitioner is not challenging in this Petition the ability of any of the jurors to render an impartial decision as to guilt; the question here is whether Samuel Cypress' answer "made unmistakably clear" that he would not be willing or able to follow the trial court's instruction in determining whether to impose the death sentence.

This Court noted in Witherspoon, and again in Boulden, that the question is really whether the venireman would be able to follow the law and instructions of the court, no matter how strong his fixed opinion against capital punishment.

> [I]t is entirely possible that a person who has "a fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.

Boulden, supra, at 483-84; see also Witherspoon, supra, at 519. Compare also the facts of Lockett v. Ohio, 438 U.S. 586 (1978), with Adams v. Texas, supra; in Lockett, this Court found no fault with voir dire seeking to elicit from the veniremen a promise to follow the instructions of the court, while in Adams, this Court struck down a requirement that each venireman swear that "the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." If a court intends to exclude a venireman on the basis of his or her feelings about the death penalty, it may only do so if that venireman shows that he or she could not follow the instructions of the court.

The Witherspoon rule is based on the principle that both the prosecution and the defense are entitled to a jury of men and women who will follow the court's instructions. The proper inquiry,

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and the only ground on which a venireman may be excluded because of his or her feelings about the death penalty, is not whether the venireman dislikes the death penalty, but whether that venireman would be able to put those views aside in applying the law as it is given to him by the court.

The voir dire of Samuel Cypress began with his answer that he had religious or conscientious scruples or objections to the imposition of the death penalty. Scruples or objections are not in themselves sufficient to support a strike for cause. Witherspoon, supra.

The Court then asked, "Is your objection to the death penalty absolute?"

Both the question asked and the answer given are inadequate to support a strike for cause. First, the question is too general and abstract. What is an "absolute" objection to the death penalty? Is it an objection that would cause the venireman to have doubts about its imposition in absolutely every case, or is it an objection that would absolutely prohibit that venireman from returning a lawful verdict? Mr. Cypress' affirmative response to the question could mean that he could never vote for the death sentence, under any circumstances, or the affirmative response could mean that he has the same moderate objection to the death penalty in every case, but that he could still vote to impose the death penalty if the facts of the case and the applicable law demanded it. The question is not an improper question; if followed up, Mr. Cypress' answer might have led to a useful and revealing discussion of the depth of his objections. But that answer to that question cannot itself serve as the basis for an exclusion for cause.

The simplest formulation of the question which may give rise to a strike for cause would be: "Could you, in a proper case, return a verdict of death?" If that is the question asked, or if the question asked is reducible to that question, so that it can be said

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with certainty that a rational venireman would understand the question as meaning the same thing, then the question may serve as a basis for a strike for cause.

Courts and commentators, pondering the philosophical bases of punishment, may have defined an "absolute objection" to the death penalty, but this philosophical term of art, the actual meaning and significance of which is known only to scholars and jurists, should not be used on voir dire. The question posed to the veniremen must be more concrete than that asked of Mr. Cypress.

> The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood — or misunderstood — by prospective jurors. Any "layman . . .[might] say he has scruples if he is somewhat unhappy about death sentences. . .[thus] a general question as to the presence of . . . reservations [or scruples] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases."

Witherspoon, supra, at 515, n.9, quoting Comment, 1968 Duke L.J. 283, 308-09.

The question "is your objection to the death penalty absolute?" is not sufficiently clear to act as a guide to seating a venireman.

The second objection concerning this particular question and answer concerns the answer that was in fact received. Mr. Cypress' somewhat equivocal answer was "Well, I would say yes." Judge Godwin was apparently not satisfied with the answer; in interpreting his colloquy with Mr. Cypress, we must infer that Judge Godwin saw that the phrase "Well, I would say yes," conveyed a sense of ambivalence. Again, the answer was not "unmistakably clear."

Judge Godwin then attempted to clear up the ambiguity by asking Mr. Cypress the question that Witherspoon requires: whether he could "in a proper case impose the death penalty?" Mr. Cypress did not answer the question; his response was "Well, I can't see where it helps any." Judge Godwin apparently felt that this response

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constituted a definite "no," and asked no more questions. Defense counsel requested (R. 136) that Mr. Cypress be called back for clarification of his answers, but the court refused.

Of course, Mr. Cypress was merely expressing his feeling about the death penalty; he in no way stated or implied an inability to follow the instructions of the court. As this Court has noted,

> [T]he most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by State law, and not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts or the circumstances that might emerge in the course of the proceedings.

Witherspoon, supra, at 522 n.21 (emphasis in original).

There is no evidence that Mr. Cypress would have been unable or unwilling to consider the death penalty. The most likely interpretation of his last answer is that he has doubts as to whether the death penalty furthers any penological purpose.

In their opinions in the death penalty cases of the last ten years, the justices of this Court have frequently discussed the proper penological ends which the death penalty may be permitted to serve, because

> [t]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering. Cf. Wilkerson v. Utah, 99 U.S. at 135-136; In re Kemmler, 136 U.S. at 447.

Gregg v. Georgia, 428 U.S. 153, 183 (1976)(opinion of Stewart, Powell, and Stevens, JJ.). The penological justification must be found not only in the general classes of crimes made punishable by death, but those penological purposes must be relevant in the particular case. The legislature makes penological policy for the general case; the judge or jury makes penological policy for the particular defendant.

The sentencing body, be it a judge or a jury, must impose sentence consistent with valid penological purposes -- retribution, deterrence, rehabilitation, and incapacitation or isolation. In

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doing so, the sentencer will inevitably, and quite properly, reflect his own values and the values of his community.

> Jury sentencing has been considered desirable in capital cases in order "to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'"

Id., at 190, quoting Witherspoon, supra, at 519 n.15. In the interests of uniformity and reviewability, the death penalty sentencing scheme requires the sentencer to make certain findings on the record. The sentencer is thus directed to consider those specific legislatively mandated penological considerations, and a reviewing court may examine the factual basis for the conclusion that the imposition of the death sentence in this particular case would serve a valid penological purpose.

Va. Code Ann. §19.2-264.2 requires that a jury find one of two aggravating circumstances before fixing the punishment at death:

1. That the defendant would likely commit future dangerous crimes, which involves a determination by the jury that he may not be rehabilitatible, that he has so little regard for the law and human life that he will attack again, or that he must suffer the ultimate in isolation from society; or

2. That the offense was so "outrageously or wantonly vile, horrible or inhuman" that the jury seeks to exact society's retribution.

In determining whether to apply the various mitigating circumstances under the Virginia death penalty statute, set forth in Va. Code Ann. §19.2-264.2, the jury must decide that:

1. Because of his mental condition at the time of the offense, he would not likely have been deterred from committing the crime ((B)(ii) and (B)(iv)); or

2. Because of his age or lack of past criminal history, he may be rehabilitatible ((B)(i) and (B)(v)); or

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3. For any reason, whether or not set out in the statute, the jury does not feel the need for retribution.

In applying these statutory criteria, the jury must make and apply penological policy. Although no juror is likely to be an expert, each juror will likely have a notion of what sorts of crimes deserve the death penalty, and of whether the death penalty would deter this defendant in particular or the populace in general. This Court specifically approved the principle of a lay jury attempting to make such determinations in Jurek v. Texas, 428 U.S. 262 (1976). The veniremen do not come to court with blank slates in place of their moral sensibilities, and the search for an impartial and neutral jury need not lead to the empanelling of twelve such veniremen.

> Guided by neither rule nor standard, "free to select or reject as it [sees] fit," a jury that must choose between life imprisonment and capital punishment can do little more -- and must do nothing less -- than express the conscience of the community on the ultimate question of life or death.

Witherspoon, supra, at 519-20. The Commonwealth is not entitled to a jury of twelve persons who believe that the death penalty is a deterrent, any more than the defendant is entitled to a jury of twelve persons who share Mr. Cypress' skepticism. All that either side has a right to expect is that the jury will be a cross-section of the community, and that deviations from that cross-section will be permitted only to the extent necessary to empanel a jury able to follow the instructions of the court.

A jury should reflect the conscience of the community, which, as Mr. Justice Douglas noted in Witherspoon, "is subject to many variables, one of which is the attitude toward the death sentence." Id. at 528. This Court recently noted that veniremen may not be excluded from the jury of a Texas murder trial

> if they aver that they will honestly find the facts and answer the [statutory questions concerning the aggravating circumstances] in the affirmative if they are convinced beyond a reasonable doubt, but not otherwise, yet who

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> frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

Adams, supra, at 593 (emphasis added).

Serious debate continues about the proper penological purposes of the death penalty; this Court has discussed the matter at painstaking length in, among other cases, Gregg v. Georgia, 428 U.S. 153 (1976). Although the opinions of a majority of the Justices of this Court have indicated approval of the "retribution" motivation for the imposition of the death penalty, the evidence on the effectiveness of capital punishment as a deterrent to crime appears to be inconclusive, see, e.g., Id. at 183-86 (opinion of Stewart, Powell and Stevens, JJ.). Other members of this Court have concluded that there is no valid penological purpose at all to be served by the death penalty. See, e.g., Gregg, supra, at 233-41 (Marshall, J., dissenting). All that can be said about Mr. Cypress' views, on the basis of his statements on voir dire, is that he shares the doubts of some members of this Court as to the deterrent value of the death penalty. That is not reason for him to be struck for cause, and it was error for Judge Godwin to have done so.

Your Petitioner asks that this Court grant his Petition for Writ of Certiorari to consider the merits of the claim that he has raised herein. This case is squarely controlled by the prior decisions of this Court, and the decision of the Virginia Supreme Court in this case is inconsistent with this Court's prior decisions.

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ARGUMENT II

IN FINDING THAT THE "OUTRAGEOUS OR WANTONLY VILE, HORRIBLE OR INHUMAN" AGGRAVATING CIRCUMSTANCE HAD BEEN PROVEN, THE TRIAL COURT AND THE VIRGINIA SUPREME COURT APPLIED AN UNCONSTITUTIONAL CONSTRUCTION OF VA. CODE ANN. §19.2-264.2, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Under Va. Code Ann. §19.2-264.2, a jury may impose the death sentence if at least one of two aggravating circumstances is found:

(1) After consideration of the defendant's past criminal record, there is a probability that he would commit acts of violence that would constitute a serious threat to society, or

(2) The defendant's conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery.

Following Va. Code Ann. §19.2-264.4(C), the jury is given a verdict form which reads:

> Cross out any paragraph, word or phrase which you do not find beyond a reasonable doubt:
>
> We, the jury, on the issue joined, having found the defendant guilty of capital murder of W. Jack Smith, Jr., as charged in the indictment, and having found that,
>
> After consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society,
>
> and/or
>
> His conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind; aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder,
>
> And having considered the evidence in mitigation of the offense, unanimously fixes punishment at death.

(R. 5).

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Because the foreman of the jury did not strike either the "and" or the "or," the aggravating circumstance(s) on which the jury relied cannot be known with any certainty.

A. Under Virginia law, the killing of Jack Smith was not so "outrageously or wantonly vile, horrible or inhuman" as to warrant the imposition of the death penalty.

In Smith v. Commonwealth, 219 Va. 455 (1979), the first case heard by the Virginia Supreme Court under the new death penalty statues, the Court gave some meaning to the vague terminology of the second aggravating circumstance. The term "aggravated battery" refers to a "battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." Id. at 478. The phrase "depravity of mind" was construed as requiring "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Id.

According to the Commonwealth, the "aggravated battery" was to be found from the fact that Turner fired two different potentially fatal shots, whereas one would have sufficed. The Virginia Supreme Court was somewhat less specific, noting merely that Jack Smith "did not die instantaneously from a single discharge of a firearm." Turner v. Commonwealth, 221 Va. ___, 221 V.R.R. 512, 527 (1980).

There was no allegation at trial or on appeal that this death sentence could be justified on the grounds of "depravity of mind" or "torture," because there was no evidence of either. Therefore, if the imposition of the death sentence under this aggravated circumstance is to be upheld, it must be based on a finding that Turner committed an "aggravated battery."

The facts of this particular crime must here be reviewed. Turner fired four shots, in all. The first shot, fired either in frustration or simply to frighten or get the attention of the persons in the store, was fired toward the rear wall of the store. As Turner

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began to panic, with police sirens audible, he fired the revolver at Smith, grazing his head. The wound, according to the medical examiner, was merely superficial, Smith then slumped to the floor. Officer Bain tried to convince Turner not to shoot again, but, as the Virginia Supreme Court found, "Turner leaned over counter and fired two bullets from the revolver into Smith's chest in rapid succession." Id. at 513-14.

The Virginia Supreme Court has not been confronted with enough incidents involving a claim of "aggravated battery" to have developed any helpful judicial gloss on the meaning of the phrase. In most cases, the violence has been so shocking as to leave little question that, however a reasonable man might define "aggravated battery," an aggravated battery had been committed. See, e.g., Waye v. Commonwealth, 219 Va. 683 (1979), where the victim had been stabbed forty-two times and her face had been beaten beyond recognition; Mason v. Commonwealth, 219 Va. 1091 (1979), where the victim had been hit in the head and body with an axe, nailed to a chair, and then set afire.

In this case, there is no such gruesome fact pattern. There was no multiple murder as in Stamper v. Commonwealth, 220 Va. 260 (1979), or Giarratano v. Commonwealth, 220 Va. ___, 266 S.E.2d 94 (1980); or execution-style killing as in Stamper or James Briley v. Commonwealth, 221 Va. ___, 221 V.R.R. 568 (1980). Of all of the cases in which the death sentence has been affirmed, this case is clearly the least aggravated. As a result, the near end of the spectrum of aggravated battery is essentially undefined.

However, the Supreme Court of Virginia has repeatedly relied on the decisions of the Georgia Supreme Court, inasmuch as the second aggravating circumstance was taken verbatim from Ga. Code Ann. §27-2534.1(b)(7), following this Court's approval of that statutory language in Gregg. See, e.g., Smith v. Commonwealth, supra, at 478; Turner v. Commonwealth, 221 V.R.R. at 526.

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The opinions of the Georgia Supreme Court also indicate that the killing of Jack Smith would not be so "outrageously or wantonly vile . . ." as to justify the imposition of the death penalty. In Harris v. State, 237 Ga. 718, 732-33, 230 S.E.2d 1, 10-11 (1976) (a decision rendered before the Virginia General Assembly enacted the revised death penalty statutes, and therefore a decision the legal effect of which was incorporated into Virginia law when §19.2-264.2 was enacted), the Georgia Supreme Court stated:

> This aggravating circumstance involves both the effect on the victim, viz., torture, or an aggravated battery; and the offender, viz., depravity of mind. As to both parties the test is that the acts (the offense) were outrageously or wantonly vile, horrible or inhuman.
>
> * * * *
>
> We believe that each of [the cases decided to date that have relied exclusively on §(b)(7)] establishes beyond any reasonable doubt a depravity of mind and either involved torture or an aggravated battery to the victim as illustrating the crimes were outrageously or wantonly vile, horrible or inhuman. Each of the cases is at the core and not the periphery. . .

Quoted in Godfrey v. Georgia, ___ U.S. ___ , 64 L.Ed.2d 398, 407-08 (1980). In other words, the "aggravated battery" is relevant to the imposition of the death sentence only if that aggravated battery illustrates a "depraved mind."

Mr. Chief Justice Burger, writing in Godfrey, noted that the Georgia Supreme Court had arrived at three separate but consistent conclusions regarding this second aggravating circumstance;

1. The evidence that the offense was "outrageously and wantonly vile, horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim."

2. The phrase "depravity of mind" comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim.

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3. The word "torture" must be construed in pari materia with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.

Id. at 408.

According to decisions by the Georgia Supreme Court arrived at before the Virginia General Assembly incorporated the Georgia aggravating circumstance into Va. Code Ann. §19.2-264.2, evidence concerning the nature of the battery to which the victim was subjected may support the imposition of the death sentence only if the evidence demonstrates "a consciousncness materially more 'depraved' than that of any person guilty of murder," Godfrey, supra, at 409, or "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Smith, supra, at 478.

The facts of this case put it at the periphery, not at the core, of those punishable by death. The question here is whether Turner's act of firing two fatal bullets in rapid succession reflects only one conscious act of malice and premeditation, or whether it reflects two different acts, showing a depravity of mind and a desire to torture or mutilate. Applying the decisions of the Virginia Supreme Court, the decisions of the Georgia Supreme Court, and the guidance of this Court in Godfrey concerning the same language, the killing of Jack Smith did not constitute an "aggravated battery" under Virginia law, and the second aggravating circumstance could not be used to support the imposition of the death sentence.

B. This Court's decision in Godfrey v. Georgia makes Virginia's application of its death penalty statute pursuant to its statutory and case law a federal constitutional question, implicating your Petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution.

This Court's power to review the factual basis of a finding that a defendant's conduct was "outrageously or wantonly vile, horrible or inhuman . . ." is based on two lines of authority.

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First, this Court has indicated that it would consider whether the application of the death penalty to a particular defendant would constitute cruel and unusual punishment in that case.

As was seen in Argument I, ante, a finding of the first aggravating circumstance -- future dangerousness -- involves a determination that the defendant cannot be rehabilitated, and that society wishes to permanently and irrevocably isolate him from society. There is also an implication that such a person is not likely to be deterred from a life of crime for reasons other than those listed in the section on mitigating circumstances, Va. Code Ann. §19.2-264.4(B).

The second aggravating circumstance flows from society's desire to exact its retribution from the defendant. Whether a crime is "outrageously or wantonly vile . . ." relates to isolation, rehabilitation, and deterrence only insofar as it is also a reflection upon the future dangerousness of the defendant. This is reflected in this Court's decision in Godfrey, in which this Court cited many factors in support of its finding that Godfrey's crime was not "outrageously or wantonly vile." Among the circumstances were a number of factors which were irrelevant to torture or aggravated battery; if the narrowing construction of the phrase "depravity of mind" from Harris v. State, supra, is adopted, these other factors are irrelevant to the "depravity of mind" criterion as well.

> His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma. Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes.

Godfrey, supra, at 409. These are all factors that are important to the consideration of an individual defendant, but which are essentially irrelevant to a strict construction of the statutory language. Godfrey manifests the realization by this Court that a statutory scheme that is otherwise constitutional may nonetheless

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result in an unconstitutional application to a defendant conviction of some people for whom execution would serve no valid penological purpose.

The second interpretation given to Godfrey is an extension of the above-cited realization. The decisions of this Court in Gregg and Godfrey have upheld the statutory language at issue here, saying that, although the language used by the Georgia legislature was not precise, the statutory scheme would be permissible provided that:

1. The Georgia Supreme Court construed the statute in a fashion specific enough to channel a jury's discretion;

2. The jury were properly instructed on the narrowing constructions; and

3. The Georgia Supreme Court reviewed the sentence for disproportionality.

The review for disproportionality must be more than merely a pro forma step; it must be an actual, meaningful review of the merits of whether a particular defendant deserves the death penalty.

In its many decisions under this statute in the last three years, the Virginia Supreme Court has only rarely undertaken a serious examination of and commentary on the facts of a particular case, and the court has done virtually nothing to constrain the unchanneled discretion of the juries of the Commonwealth in death cases.

The result of this abdication of responsibility by the Virginia Supreme Court is that the discretion of the jury is not being properly channeled.

> In Furman v. Georgia, 408 U.S. 238 (1972), this court held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitary and capricious manner. Gregg v. Georgia, supra, reaffirmed this holding:

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> "[W]here discretion is afforded a sentencing body on a matter so grave as the determination as whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Id., at 189 (opinion of Stewart, Powell and Stevens, JJ.)

Godfrey, supra, at 405-06.

Even those narrowing constructions that have emanated from the Virginia Supreme Court are not being communicated to jurors at capital trial. In the experience of Virginia courts with the Virginia death penalty statute, one of the most prevalent flaws is the failure by the trial court properly to instruct the jury concerning the mitigating or aggravating circumstances. The Virginia Supreme Court has held, without any stated reservations or qualifications, that the aggravating circumstances are not unconstitutionally vague, see Martin v. Commonwealth, 221 Va. ___ , 221 V.R.R. 433 (1980), apparently finding in that language considerably greater specificity than this Court found in the same language in Godfrey. This Court's cautions in Gregg and Godfrey notwithstanding, the Virginia Supreme Court has never seen fit to require instructions defining the terms "depravity of mind" and "aggravated battery." See, e.g., Clark v. Commonwealth, 220 Va. 211, 257 S.E.2d 784, 790-91 (1979), cert. denied, 444 U.S. 1049 (1980).

The meanings of the terms "depravity of mind" and "aggravated battery" are by no means self-evident, the contentions of the Virginia Supreme Court notwithstanding. In the absence of proper instructions concerning the application of these aggravating criteria, Petitioner received

> [t]he standardless and unchanneled imposition of [a] death sentence in the uncontrolled discretion of a basically uninstructed jury.

Godfrey, supra, at 407.

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The imposition of the death sentence upon Petitioner Willie Lloyd Turner pursuant to the second aggravating circumstance is "wholly arbitrary and capricious action." An essentially uninstructed jury, whose actions were affirmed by a Court that has never struck down a death penalty for disproportionality, unconstitutionally imposed the death sentence on your Petitioner, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons stated above, Petitioner respectfully prays this Court to grant his Petition for a Writ of Certiorari to the Supreme Court of Virginia, and to review his claims on the merits.

WILLIE LLOYD TURNER

By Counsel

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No. _____

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WILLIE LLOYD TURNER,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

APPENDIX

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Present: All the Justices

WILLIE LLOYD TURNER

v. Record No. 800375

COMMONWEALTH OF VIRGINIA

OPINION BY CHIEF JUSTICE LAWRENCE W. I'ANSON
November 26, 1980

FROM THE CIRCUIT COURT OF SOUTHAMPTON COUNTY
James C. Godwin, Judge

The defendant, Willie Lloyd Turner, was convicted of capital murder, Code § 18.2-31(d)[1]; possession of a sawed-off shotgun in the commission of a crime of violence (robbery), Code § 18.2-300(A); and the use of a firearm (a pistol) in the commission of a felony (murder), Code § 18.2-53.1. The jury fixed Turner's punishment at one year in the penitentiary for violating Code § 18.2-53.1 and life imprisonment for violating Code § 18.2-300(A). In the second stage of the bifurcated proceeding conducted pursuant to Code §§ 19.2-264.3 and -264.4, the jury fixed the defendant's punishment for capital murder at death. At the conclusion of a separate sentencing hearing conducted pursuant to Code § 19.2-264.5, the trial court sentenced the defendant to death for capital murder and sentenced him in accordance with the jury's verdicts on the other two offenses. The defendant is here for an automatic review of the death sentence, consolidated with his appeal from his several convictions. Code § 17-110.1.

I. FACTS

On July 12, 1978, at approximately 11:30 a.m., Willie Lloyd Turner, a black male, entered a jewelry store owned and

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[1] Code § 18.2-31(d) provides that "[t]he willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon" constitutes capital murder.

operated by W. Jack Smith, Jr., a white male. In addition to Smith, an employee (Mary Huffman) and a customer were present when Turner entered the store. After entering the store, Turner displayed a sawed-off shotgun previously concealed by a towel and demanded money and jewelry. Smith, while placing money and jewelry into the store's jewelry bags, triggered a silent alarm alerting the police department.

Judith R. Cosby and Police Officer Alan D. Bain, having entered the store without knowing a robbery was in progress, were detained in the store by Turner. Having discovered Smith had triggered a silent alarm, Turner demanded that Smith turn off the alarm. After acceding to Turner's demand, Smith, along with Cosby, began placing additional valuables designated by Turner into jewelry bags.

Near the rear of the store, Turner examined a revolver taken from Bain and fired a bullet toward the rear wall. Turner stated if he saw or heard any additional police officers, he was going to start killing those in the store. About that time, Bain heard a siren. Turner then walked from the back of the store toward the middle of the store, where Smith was stationed behind a counter, and fired a bullet from the revolver at Smith without warning. Smith, with blood on his temple, slumped behind the counter. Bain began talking with Turner, promising him to take him anywhere he wanted to go and asking him not to shoot again. While Bain talked with Turner, two occupants scrambled out the front door. After Turner told Bain he was going to kill Smith because he had triggered the silent alarm, Turner leaned over the counter and fired two bullets from the revolver into

Smith's chest in rapid succession. Bain then grabbed and subdued Turner while Cosby ran out the front door. Smith died as a result of the bullets fired by Turner into Smith's chest.

II. JURY SELECTION AND SEQUESTRATION

Several of the defendant's assignments of error concern the manner in which voir dire was conducted. Over defense counsel's objections, the trial judge ruled that he alone would ask the questions of prospective jurors during voir dire. He also concluded that he would question jurors in groups of five, except when questioning jurors concerning their views on the death penalty. Although questioning concerning the death penalty occurred at least initially in groups of five, each prospective juror was required to answer individually at least two questions concerning capital punishment.[2] Prior to the day of trial, the court asked counsel for the Commonwealth and the defendant to submit questions they wished to have asked. Turner's counsel submitted a list of fifteen questions, nine of which were asked by the trial judge.

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[2] Jurors were asked variations of the following questions: "Do you have any religious or conscientious scruples or objections against the imposition of the death sentence?" and "Do you feel that in each and every case, regardless of the facts, where a person is convicted of murder he should receive the death penalty?" Those jurors answering no to both questions were deemed suitable, without further questioning, with respect to their attitude toward the death penalty. Those answering yes to either question were questioned further by the court.

A. REFUSAL TO ALLOW COUNSEL-CONDUCTED VOIR DIRE

The defendant contends that Code § 8.01-358[3] gives both court and counsel an unconditional right to question prospective jurors directly and that the trial court abridged this statutorily created right by refusing to allow counsel-conducted voir dire. Citing Supreme Court Rule 3A:20(a),[4] the Commonwealth replies that trial courts have discretion in determining whether to permit counsel-conducted voir dire.

The Constitution of Virginia, Art. VI, § 5, prohibits the promulgation of any court rule "in conflict with the general law as the same shall, from time to time, be established by the General Assembly." Supreme Court Rule 3A:20(a) clearly makes the right to counsel-conducted voir dire contingent upon the trial court's approval. In resolving the issue before us, we must determine whether Code § 8.01-358 confers upon attorneys the unconditional right to question prospective jurors directly.

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[3] Code § 8.01-358 provides: "The court and counsel for either party may examine under oath any person who is called as a juror therein and may ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case.

"A juror, knowing anything relative to a fact in issue, shall disclose the same in open court."

[4] Supreme Court Rule 3A:20(a) provides that following mandatory questioning by the court as to seven potential grounds for juror exclusion, "the court, or counsel with permission of the court, may examine on oath any prospective juror or may ask any question relevant to his qualifications as an impartial juror."

If Code § 8.01-358 confers such a right, it prevails over that portion of Rule 3A:20(a) which makes the exercise of that right contingent upon the trial court's approval.

The legislative history of § 8.01-358 is useful in discerning whether the General Assembly intended to confer such a right upon attorneys. The Code of 1887 § 3154 required trial courts to question prospective jurors when requested to do so by the litigants.[5] The Code of 1919 § 6000 enlarged a trial court's powers by providing that a court could question jurors even though not requested to do so by counsel.[6] The pertinent language remained unchanged for several decades. See Code of 1950 § 8-199 (1950). In 1966, the General Assembly amended Code § 8-199 to read as follows:

> "The court and counsel for either party may examine on oath any person who is called as a juror therein and may ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case."

Acts 1966, c. 496, at 676 (language added in 1966 italicized). On June 15, 1971, this court promulgated a comprehensive set of

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[5] Code of 1887 § 3154 provided, insofar as is pertinent, that "[t]he court shall, on motion of either party in any suit, examine on oath any person who is called as a juror therein, to ascertain" the juror's qualifications.

[6] Code of 1919 § 6000 provided, insofar as is pertinent, that "[t]he court shall, on motion of either party in any suit, or may of its own accord," examine any prospective juror.

rules governing criminal practice and procedure, to be effective January 1, 1972. One of these rules was Rule 3A:20, which unambiguously gives the trial court discretion in determining whether to allow counsel-conducted voir dire. 211 Va. cvi (1971). Code § 8-199 was recodified as Code § 8-208.28 in 1973 without any change. Acts 1973, c. 439, at 651-52. In another recodification, the texts of Code §§ 8-215 (1957 Repl. Vol.)[7] and 8-208.28 were combined to form the present text of Code § 8.01-358. Acts 1977, c. 617, at 1111.

As both parties recognize, we have not previously resolved whether the 1966 amendment to this statute confers upon attorneys an unconditional right to participate directly in voir dire. In Harmon v. Commonwealth, 209 Va. 574, 166 S.E.2d 232 (1969), we held that when a litigant's attorney has agreed that the judge alone would ask the voir dire questions, he or she cannot require the trial judge to exercise that right in a particular fashion. In upholding Harmon's conviction, we concluded that the statutory permission for the court to ask such questions directly does not require a court to do so. Thus, the trial court was permitted, but not required as contended by Harmon, to question jurors individually. In regard to voir dire conducted by counsel, we noted that the propounding of questions by the trial judge, and not by counsel for the defendant, was "in accordance with the usual practice." 209 Va. at 579, 166 S.E.2d at 236. We also concluded that the word "may" "is not mandatory but permissive

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[7] Code § 8-215 (1957 Repl. Vol.) provided: "A juror, knowing anything relative to a fact in issue, shall disclose the same in open court."

and leaves the matter to the discretion of the trial court." 209 Va. at 580, 166 S.E.2d at 236.

Prior to the 1966 amendment, the litigants' counsel had no authority whatsoever for directly participating in voir dire examinations. "Although the statute formerly required the judge alone to ask the questions, in practice most trial courts permitted counsel to ask them directly." Boyd, Practice and Pleading - The Twelfth Annual Survey of Virginia Law: 1966-1967, 53 Va. L. Rev. 1763, 1781 (1967)(emphasis added). The 1966 amendment "sanction[ed] this deviation and [brought] Virginia in line with the procedure in other jurisdictions." Id. Thus, the amendment authorized what was already in fact occurring: counsel's participation in voir dire when permitted by the trial court.

Cognizant that the statutory language might be subject to different interpretations, this court in 1971 promulgated Rule 3A:20(a) of the Rules of Criminal Practice and Procedure. This Rule, which clearly makes counsel's participation in voir dire contingent upon the trial court's approval, resolved any ambiguity present in the statutory language.

Turner suggests that, even if Code § 8.01-358 confers no unconditional right to counsel-conducted voir dire, the trial court abused its discretion in refusing to allow defense counsel to question prospective jurors directly and in not questioning each prospective juror out of the presence of other jurors. While the defendant has a constitutional right to a fair and impartial jury, he has no constitutional right to counsel-conducted voir dire. See, e.g., United States v. Duke, 409 F.2d 669, 671 (4th Cir. 1969), cert. denied, 397 U.S. 1062 (1970). In the

absence of a statute or court rule to the contrary, as long as the selection procedure results in a fair and impartial jury, the manner in which a jury is to be selected is properly within the trial court's sound discretion. Thus, the trial court's refusal to question jurors individually out of the presence of other prospective jurors and the court's refusal to allow counsel-conducted voir dire do not represent an abuse of discretion. See Dean v. Commonwealth, 209 Va. 666, 669, 166 S.E.2d 228, 230 (1969). We have carefully examined the voir dire conducted by the trial judge and believe it resulted in a fair and impartial jury. Under such circumstances, we cannot say the trial judge abused his discretion.

B. REFUSAL TO ASK SPECIFIC QUESTIONS PROPOSED BY DEFENSE COUNSEL

As noted previously, the trial court refused to ask several questions proposed by defense counsel.[8] Turner contends

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[8] Of the fifteen questions submitted by defense counsel, one question was withdrawn, nine were asked by the trial judge, and five were refused. These five questions were:

"(10) The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?

(11) Do you feel that if a person is to be given the death penalty for the unlawful killing of another person, such penalty should be given only if such killing is of the most severe and aggravated nature?

. . . .

(13) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty?

(14) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty if there is a probability that the person would commit criminal acts of violence that would constitute a continuing threat to society?

(15) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty if his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder?"

that the failure to ask these questions constituted prejudicial error.

The pre-1966 text of what is now Code § 8.01-358 provided that "[t]he court shall, on motion of either party in any suit, examine" jurors to ascertain their qualifications concerning impartiality and lack of bias. The 1966 amendment deleted this requirement, providing merely that "the court . . . may examine [a prospective juror] and may ask [such juror] any relevant question." In Harmon v. Commonwealth, 209 Va. at 580, 166 S.E.2d at 236, we held that this statutory language "is not mandatory but permissive and leaves the matter to the discretion of the trial court." With the exception of seven questions, all of which were asked in this case, Rule 3A:20(a) makes voir dire questioning entirely discretionary with the trial court. Unless the refusal to ask a question amounts to a denial of due process or otherwise impinges upon the right to a fair and impartial jury, see, e.g., Ham v. South Carolina, 409 U.S. 524 (1973), the present wording of Code § 8.01-358 and Rule 3A:20(a) empowers a trial court to use its discretion in determining whether to ask questions proposed by either the Commonwealth or the defendant.

The trial court's refusal to ask the questions proposed by defense counsel did not impinge upon the defendant's right to a fair and impartial jury. While "the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant," a trial court's refusal to do so is not constitutionally objectionable in the absence of

factors similar to those in Ham.[9] Ristaino v. Ross, 424 U.S. 589, 597 n.9 (1976). The mere fact that a defendant is black and that a victim is white does not constitutionally mandate such an inquiry. Lewis v. Commonwealth, 218 Va. 31, 35-36, 235 S.E.2d 320, 323 (1977). The refusal of the trial court to ask other questions, those concerning the circumstances under which a prospective juror would vote for the death penalty, likewise is not constitutionally objectionable. The voir dire questioning conducted by the trial judge probed many of the areas touched upon by these questions and assured the removal of those who would invariably impose capital punishment. The court's instructions to the jury clearly delineated the circumstances in which the death penalty could be imposed. Since the questioning actually conducted by the court preserved the defendant's right to a fair and impartial jury, the trial court's refusal to ask the voir dire questions proposed by defense counsel was not an abuse of discretion.

C. EXAMINATION OF PROSPECTIVE JURORS CONCERNING ATTITUDES ABOUT CAPITAL PUNISHMENT

For the reasons stated in Waye v. Commonwealth, 219 Va. 683, 690-91, 251 S.E.2d 202, 207, cert. denied, 442 U.S. 924 (1979), we reject Turner's contention that the trial court should not have questioned prospective jurors concerning their willingness to impose capital punishment.

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[9] Turner introduced a study indicating that black defendants killing white victims receive the death penalty more frequently than black defendants killing blacks, whites killing blacks, or whites killing whites. The study, however, was based upon statistics compiled in other states and thus was of little utility in establishing the potential of prejudice in Virginia.

We likewise believe that the trial court properly struck Samuel Cypress from the venire. After asking Cypress variations of the questions asked of others on the panel,[10] the trial judge concluded that Cypress' objections to capital punishment were absolute. While jurors may not be excluded "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction," Witherspoon v. Illinois, 391 U.S. 510, 522 (1968), those

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[10] The complete examination of Cypress appears below:

"THE COURT: Now, Mr. Cypress, do you have any religious or conscientious scruples or objections against the imposition of the death penalty?

MR. CYPRESS: Well, really, I don't go for the death penalty.

THE COURT: Can you say yes or no to that question?

MR. CYPRESS: No.

THE COURT: Or yes?

MR. CYPRESS: Do I have any objection?

THE COURT: Yes.

MR. CYPRESS: Yes.

THE COURT: Is your objection to the death penalty absolute?

MR. CYPRESS: Well, I would say yes.

THE COURT: Could you in a proper case impose the death penalty?

MR. CYPRESS: Didn't hear.

THE COURT: Could you in a proper case impose the death penalty?

MR. CYPRESS: Well, I can't see where it helps any."

jurors irrevocably committed to voting against the death penalty may be excluded. Coppola v. Commonwealth, 220 Va. 243, 250, 257 S.E.2d 797, 802 (1979), cert. denied, 444 U.S. 1103 (1980); Smith v. Commonwealth, 219 Va. 455, 464, 248 S.E.2d 135, 141 (1978), cert. denied, 441 U.S. 967 (1979). The trial court's determination that a juror is irrevocably committed to voting against the death penalty will not be disturbed on appeal unless we can say the prospective juror's commitment against the death penalty was not "unmistakably clear." Smith v. Commonwealth, 219 Va. at 465, 248 S.E.2d at 141. Accord, Coppola v. Commonwealth, 220 Va. at 250, 257 S.E.2d at 802. On the basis of the answers given by Cypress, the trial court reasonably concluded he was irrevocably committed against the death penalty.

D. SEQUESTRATION OF THE JURY

Turner sought and obtained a change of venue from Southampton County to Northampton County. Upon learning of a recent Northampton County case involving the death penalty and another murder in the area, defense counsel moved for another change in venue and for sequestration of the jury, both of which were denied. Turner contends that the refusal to sequester the jury was prejudicial error.

As Turner's counsel notes, a judge has discretion in determining whether to sequester a jury. The mere fact of media coverage does not require a judge to sequester a jury. Thompson v. Commonwealth, 219 Va. 498, 247 S.E.2d 707 (1978). A trial judge's discretion regarding sequestration extends to cases involving capital punishment. We hold that, in the absence of any indication of pretrial prejudicial publicity, a trial judge has wide discretion in deciding whether to sequester a jury.

III. CONSTITUTIONALITY OF THE DEATH PENALTY PROVISIONS

A. FACIAL CONSTITUTIONALITY

Turner contends that Virginia's statutory provisions concerning the death penalty are facially unconstitutional for reasons previously rejected by us. See Martin v. Commonwealth, 221 Va. ___, ___, ____ S.E.2d ____, ____ (1980); Mason v. Commonwealth, 219 Va. 1091, 1094-95, 254 S.E.2d 116, 118-19 (1979); Waye v. Commonwealth, 219 Va. 683, 698-99, 251 S.E.2d 202, 211 (1979); and Smith v. Commonwealth, 219 Va. 455, 476-79, 248 S.E.2d 135, 148-49 (1978). We reaffirm these prior holdings concerning the facial constitutionality of the death penalty statutory provisions.

Turner also argues that the imposition of the death penalty on the basis of a jury's conclusion regarding a defendant's propensity for future crime is unconstitutional.[11] The statutory objective of isolating a criminal, according to Turner, can be accomplished through the less drastic measure of life imprisonment. As Turner acknowledges, Jurek v. Texas, 428 U.S. 262 (1976), upheld as constitutional a Texas statute allowing the imposition of the death penalty where a jury determines, inter alia, the defendant would probably commit "criminal acts of violence that would constitute a continuing threat to society." 428 U.S. at 269. While the only issue explicitly addressed

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[11] Turner does not contend that the jury had no basis for concluding he would probably commit "criminal acts of violence that would constitute a continuing serious threat to society... ." Code § 19.2-264.2. Since 1974, the defendant has been convicted of malicious maiming, escape, unlawful wounding, malicious wounding, and second-degree murder. Four of these offenses occurred in the penal system.

concerning a defendant's propensity for future criminal conduct was whether the jury was being asked to resolve a question beyond its competency, 428 U.S. at 274-76, we believe Jurek holds that a defendant's propensity for future criminal acts of violence is an acceptable consideration in determining whether to impose the death penalty. See also Gregg v. Georgia, 428 U.S. 153, 183 n.28 (1976)(plurality opinion).

B. CONSTITUTIONALITY AS APPLIED

Citing Godfrey v. Georgia, 100 S. Ct. 1759 (1980), Turner contends there was insufficient evidence to support a conclusion that his conduct in committing the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery." Code § 19.2-264.2. As we noted in James Dyral Briley v. Commonwealth, ___ Va. ___, ____ S.E.2d ____ (this day decided), Godfrey rested upon its unique facts. The Godfrey prosecutor conceded the defendant had not tortured the victims or committed an aggravated battery upon them. 100 S. Ct. at 1763. Godfrey had no prior criminal record. Thus, the death sentence rested upon the jury's finding that Godfrey's actions had been "outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity of mind." 100 S. Ct. at 1767. Rejecting such a conclusion as unconstitutional, the Supreme Court of the United States noted several facts: Godfrey's victims, family members who had caused him "extreme emotional trauma," were killed instantaneously; and shortly after the killings Godfrey acknowledged his involvement and the heinous nature of his crimes. Id. Godfrey's crimes were not deemed to reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." Id. In summary, the state had not

proven "a principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id.

The second clause of Code § 19.2-264.2 (hereafter, the "vileness" clause) provides specific criteria which must be met before the death penalty can be imposed on the basis of this clause. The conduct in committing the offense must be deemed to be "outrageously or wantonly vile, horrible or inhuman." Code § 19.2-264.2. Second, the jury must conclude that the conduct establishes one of the following: torture of the victim, an aggravated battery of the victim, or the perpetrator's depravity of mind. See Hance v. State, Case No. 36012 (Ga., filed June 24, 1980).

In the present case, the Commonwealth established that Turner's conduct was "outrageously or wantonly vile, horrible or inhuman." Turner first shot Smith in the head without warning. After Smith slumped behind the counter, Bain immediately pleaded with Turner not to fire any more. After the defendant had fired one bullet hitting the rear wall and another one hitting Smith's head, Cosby became nauseous and asked if she could be seated. Rejecting Bain's pleas, Turner then leaned over the counter and fired two bullets into Smith's chest. While Smith was slumped behind the counter, Cosby heard him "gurgling." The evidence also establishes Turner committed an "aggravated battery": a "battery which, qualitatively and quantitatively, is more culpable than the minimun necessary to accomplish an act of murder." Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978). After being wounded by Turner, Smith

slumped helplessly behind the counter. Unlike Godfrey's victims, Smith did not die instantaneously from a single discharge of a firearm.

Virginia's death penalty statute authorizes the imposition of the death penalty if either the "dangerousness" or "vileness" standard is met. Even if Turner's crime did not meet the "vileness" standard, imposition of the death penalty would be permissible under the "dangerousness" standard.[12] On the basis of Turner's prior criminal record, set forth in footnote 11, the jury could reasonably conclude that the defendant would probably "commit criminal acts of violence that would constitute a continuing serious threat to society." Code § 19.2-264.2.

IV. REFUSAL TO INSTRUCT THE JURY CONCERNING MURDER IN THE COMMISSION OF AN ATTEMPTED ROBBERY

Code § 18.2-31(d), as noted earlier, provides that murder "in the commission of robbery" while armed with a deadly weapon is capital murder. Code § 18.2-32 provides that murder "in the commission of, or attempt to commit," robbery is first-degree murder. Whereas Code § 18.2-32 is violated by a murder in an attempted robbery, Code § 18.2-31(d) is not. To be convicted under Code § 18.2-31(d), the defendant must have committed a robbery.

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[12] As in James Dyral Briley v. Commonwealth, ___ Va. ___, ___ S.E.2d ___ (this day decided), the jury returned a sentencing verdict without striking out the inapplicable language ("and" or "or"). Unlike in Briley, however, the trial judge in Turner's case refused to ask the jury members, either individually or collectively, whether their sentencing verdict was grounded upon the "dangerousness" or "vileness" standard or both. While the trial judge's refusal was not prejudicial error, it would accord with better practice to determine with certainty the basis for the jury's sentence. Such a procedure would greatly facilitate the process of appellate review.

Turner contends that the jury should have been instructed concerning the lesser offense of first-degree murder because the evidence failed to establish the commission of a robbery. While Turner never had physical possession of the jewelry bags personally, we believe the requirement of asportation has been satisfied in this case. "The degree of asportation necessary to constitute a taking under the common law definition of robbery need be only slight." Durham v. Commonwealth, 214 Va. 166, 168, 198 S.E.2d 603, 606 (1973). A perpetrator exercises dominion and control over an object where he commands another to seize the object and the person complies. In this case, Turner at gunpoint commanded Smith and Cosby to place money and valuables into jewelry bags owned by the store. Placing the money and valuables into the bags as requested, Smith and Cosby then put the bags on the counter. Turner exercised dominion and control over the money and valuables when Smith and Cosby asported these items at his command.

V. DOUBLE JEOPARDY

Citing Busic v. United States, 100 S. Ct. 1747 (1980), Turner contends that the Double Jeopardy Clause of the United States Constitution[13] was violated when he was convicted of the

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[13] U. S. Const., amend. V, provides that no one in a criminal case "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb."

use of a firearm in the commission of a felony, Code § 18.2-53.1,[14] as well as murder in the commission of a robbery "while armed with a deadly weapon," Code § 18.2-31(d). In Busic, the Supreme Court held that 18 U.S.C. § 924(c), providing enhanced punishment for one using or carrying a firearm[15] in the commission of a felony, could not be applied to a defendant using a firearm in the course of a felony that is proscribed by a statute which itself authorizes enhancement if a deadly weapon is used. Both Busic and its precursor, Simpson v. United States, 435 U.S. 6 (1978), were based upon a determination of Congressional intent.

The constitutional prohibition of double jeopardy consists of three separate guarantees: (1) "It protects against a second prosecution for the same offense after acquittal. [(2)] It protects against a second prosecution for the same offense after conviction. [(3)] And it protects against multiple punishments for the same offense." Illinois v. Vitale,

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[14] Code § 18.2-53.1 provides that: "It shall be unlawful for any person to use or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit murder, rape, robbery, burglary, malicious wounding as defined in § 18.2-51, or abduction. Violation of this section shall constitute a separate and distinct felony and any person found guilty thereof shall be sentenced to a term of imprisonment of one year for a first conviction, and for a term of three years for a second or subsequent conviction under the provisions of this section. Notwithstanding any other provision of law, the sentence prescribed for a violation of the provisions of this section shall not be suspended in whole or in part, nor shall anyone convicted hereunder be placed on probation. Such punishment shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony."

[15] Firearm, as defined in 18 U.S.C. § 921, includes a number of destructive devices not generally deemed to be firearms. See Simpson v. United States, 435 U.S. at 10, n.4.

100 S. Ct. 2260, 2264 (1980) quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969). In determining whether a defendant has been twice convicted for the "same offense," U. S. Const., amend.V, courts have been guided by the test set forth in Blockburger v. United States, 284 U.S. 299, 304 (1932): "[T]he test to be applied to determine whether there are two offenses or only one, is whether each [statutory] provision requires proof of a fact which the other does not."

We need not resolve whether one convicted of the use of a firearm in the commission of a felony (Code § 18.2-53.1) and murder in the commission of a robbery while armed with a deadly weapon [Code § 18.2-31(d)] has been convicted twice for the "same offense" under the Blockburger test.[16] As noted earlier, the defendant's convictions stem from a single criminal trial. Consequently, only the third constitutional guarantee (the guarantee against multiple punishments) is at issue in this appeal. The constitutional guarantee against multiple punishments "is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." Brown v. Ohio, 432 U.S. 161, 165 (1977).

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[16] The statutory provisions at issue in this case are similar to those at issue in Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W.2d 793 appeal dismissed for want of a substantial federal question sub. nom., Brintley v. Michigan, 100 S. Ct. 418 (1979)(use of a firearm in the commission of a felony and robbery "while armed with a dangerous weapon.") Under Hicks v. Miranda, 422 U.S. 332, 343-45 (1975), the Supreme Court's dismissals for want of a substantial federal question are dispositive precedent for those issues presented in a petitioner's appeal. In light of our conclusion concerning the significance of legislative intent on the issue before us, it is unnecessary to determine whether the Supreme Court's dismissal for want of a substantial federal question adjudicated whether felony-firearm and robbery "while armed with a dangerous weapon" constituted the same offense under Blockburger.

Where two or more punishments for separate statutory violations are imposed in a single criminal proceeding, "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to impose." Whalen v. United States, 100 S. Ct. 1432, 1441 (1980)(Blackmun, J., concurring).

The General Assembly has clearly indicated its intent to impose multiple punishments for capital murder and use of a firearm in the commission of a felony. Code § 18.2-53.1 provides that a "[v]iolation of this section shall constitute a separate and distinct felony" and that the punishment imposed for violating Code § 18.2-53.1 "shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony." This language reflects an unambiguous intent to authorize multiple punishment for a single criminal transaction. Thus, Turner's double jeopardy claim has no merit.

VI. REVIEW REQUIRED BY CODE § 17-110.1

Code § 17-110.1(C)(1) requires that we consider and determine whether the death sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor." We have carefully considered the record in this case and find no indication that the death sentence was the product of these enumerated factors.

Code § 17-110.1(C)(2) requires us, after "considering both the crime and the defendant," to determine whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases." We have reviewed death sentences in those cases involving murder in the commission of a robbery

while armed with a deadly weapon. James Dyral Briley v. Commonwealth, ____ Va. ____, ____ S.E.2d ____ (this day decided); Linwood Briley v. Commonwealth, ____ Va. ____, ____ S.E.2d ____ (this day decided); Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979), cert. denied, 100 S. Ct. 1666 (1980); Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979), cert. denied, 444 U.S. 1103 (1980). While the atrociousness involved in Turner's murder does not rise to the level evidenced in Stamper, James Dyral Briley, or Coppola, Turner's murder is just as brutal as the murders in Linwood Briley and Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), cert. denied, 444 U.S. 1049 (1980). Moreover, the defendant's criminal record, detailed in footnote 11, is one of the most extensive we have reviewed under Code § ~~17-110(C).~~ 17-110.1(C). Turner, unlike any of the other defendants except for Mason,[17] had been convicted for a previous murder. Certainly his prior criminal record is as extensive or more extensive than the criminal records of those other defendants sentenced to death for murder in the commission of an armed robbery. Having considered "both the crime and the defendant," Code § 17-110.1(C)(2), we conclude the death sentence is not excessive or disproportionate to the sentences imposed in similar cases.

VII. OTHER ASSIGNMENTS OF ERROR

For the reasons stated in James Dyral Briley v. Commonwealth, supra, and Linwood Briley v. Commonwealth, supra, we reject Turner's contention that a further change in venue

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17 Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116, cert. denied, 444 U.S. 919 (1979).

was necessary. We likewise reject his argument that photographs of the victim and crime scene should not have been introduced into evidence. Waye v. Commonwealth, 219 Va. at 692, 251 S.E.2d at 207-08. Moreover, Turner's contention that the jury should have been given an instruction concerning the possibility of parole has no merit. Stamper v. Commonwealth, 220 Va. at 278, 257 S.E.2d at 821; Clark v. Commonwealth, 220 Va. at 214, 257 S.E.2d at 792.

Turner raises several other assignments of error, discussed neither in his brief nor in oral argument. After examining each of these assigned errors, we conclude that they have no merit and require no further discussion.

Having given the defendant's case both appellate and independent review, we conclude there is no reversible error in either his convictions or sentences, and we find no other reason to disturb or commute his death sentence. Therefore, we affirm the judgments pronounced by the trial court.

Affirmed.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 26th *day of* November, 1980.

Willie Lloyd Turner, Appellant,

against Record No. 800375

Commonwealth of Virginia, Appellee.

Upon an appeal from judgments rendered by the Circuit Court of Southampton County on the 19th day of February, 1980.

For reasons stated in writing and filed with the record, the court is of opinion that there is no error in the judgments appealed from. Accordingly, the judgments are affirmed.

It is ordered that the said circuit court allow counsel for the appellant a fee of $550 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses.

This order shall be forthwith certified to the said circuit court.

A Copy,

Teste:

Allen L. Lucy

Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 16th *day of* January, 1981.

Willie Lloyd Turner, Appellant,

against Record No. 800375

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 26th day of November, 1980, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Allen L. Lucy

Clerk

No. 80-6366

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WILLIE LLOYD TURNER,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondant

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Willie Lloyd Turner, by his counsel, moves this Court to grant him leave to proceed in forma pauperis with respect to his Petition for Writ of Certiorari to the Supreme Court of Virginia, which Petition for Writ of Certiorari is filed contemporaneously herewith, repesenting unto the Court as follows:

1. Appellant is unable to pay fees, costs or security for the petition having been filed on Appellant's behalf.

2. The nature of the Petition for Writ of Certiorari is to seek review of the judgment entered by the Supreme Court of Virginia affirming the imposition of the sentence of death upon your Petitioner for capital murder. Appellant was convicted under Va. Code Ann. §18.2-31(1977 Cum. Supp.). He contends in his Petition for Writ of Certiorari that he was denied a fair trial by an impartial jury guaranteed him under the Sixth and Fourteenth Amendments to the United States Constitution. Petitioner also asserts that imposition of the death penalty in his case would constitute cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

LAW OFFICES
LOWE, GORDON,
JACOBS & REDINGER, LTD.
CHARLOTTESVILLE, VA.

3. Appellant is contemporaneous filing an affadavit as requird by 28 U.S.C. §1915 with filing of this application.

WILLIE LLOYD TURNER

By counsel

John C. Lowe
Lowe, Gordon, Jacobs & Redinger, Ltd.
409 Park Street
Charlottesville, Virginia 22901

MAILING CERTIFICATE

I John C. Lowe, a member of the Bar of this Court, make oath that, on or before March 17, 1981, I caused this Motion For Leave to Proceed In Forma Pauperis, with the supporting affidavit, to be deposited in a United States Post Office or mailbox, with First-Class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, pursuant to Rule 28.2. I further make oath that I caused one copy of each of the above-mentioned documents to be sent to Robert H. Anderson, 830 East Main Street, Richmond, Virginia 23219, by depositing in the United States Post Office mailbox, with First-Class postage prepaid.

John C. Lowe

STATE OF VIRGINIA

City of Charlottesville to wit:

Sworn, subscribed and acknowledged before me this 17th Day of March, 1981, by John C. Lowe.

Notary Public

My commission expires: June 26, 1982

LAW OFFICES
LOWE, GORDON,
JACOBS & REDINGER, LTD.
CHARLOTTESVILLE, VA.

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80 - 6366

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No._____

WILLIE LLOYD TURNER,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Willie Lloyd Turner, having been duly sworn, do depose and say that:

1. I am the Petitioner in the above-entitled cause;

2. That I am indigent and unable to pay the fees and costs, or to give security for the fees and costs, associated with the prosecution of the attached Petition for Writ of Certiorari to the Supreme Court of Virginia;

3. That I was certified as an indigent at trial, and was appointed an attorney at that time;

4. That I pursued my appeal to the Supreme Court of Virginia as an indigent with court-appointed counsel, pursuant to the Rules of the Supreme Court of Virginia;

5. That I have been incarcerated since my arrest on this charge;

6. That I am not presently employed, and have not been employed since before my arrest two years ago;

7. That I have not received income from any other source in the last twelve months, and that I have no cash, bank accounts, or valuable property.

LAW OFFICES
LOWE, GORDON,
JACOBS & REDINGER, LTD.
CHARLOTTESVILLE, VA.

WHEREFORE, I respectfully pray this Court, pursuant to the attached Application to Proceed In Forma Pauperis, to allow me to file the attached Petition for Writ of Certiorari in forma pauperis.

Willie Lloyd Turner

STATE OF VIRGINIA

COUNTY OF MECKLENBURG, to wit:

Subscribed, sworn and acknowledged before me this 3rd day of March, 1981, by Willie Lloyd Turner.

Notary Public

My Commission expires: 9-24-84

LAW OFFICES
LOWE, GORDON,
JACOBS & REDINGER, LTD.
CHARLOTTESVILLE, VA.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ORIGINAL COPY

No. 80-6366

WILLIE LLOYD TURNER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Brief In Opposition On Behalf Of The Commonwealth

MARSHALL COLEMAN
ATTORNEY GENERAL OF VIRGINIA

ROBERT H. ANDERSON, III
ASSISTANT ATTORNEY GENERAL

Supreme Court Building
Richmond, Virginia 23219

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
ARGUMENT AGAINST GRANTING CERTIORARI	4
CONCLUSION	13
CERTIFICATE OF SERVICE	13

TABLE OF CITATIONS

Cases

	PAGE
Briley v. Commonwealth, 221 Va.____, 273 S.E.2d 48 (1980)	11
Cardinale v. Louisiana, 394 U.S. 437 (1969) . . .	12
Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), cert. denied, 444 U.S. 1049 (1980)	11
Edelman v. California, 344 U.S. 357 (1953)	11, 12
Frith v. State, 325 N.E.2d 186 (Ind. 1975)	7
Godfrey v. Georgia, ____U.S.___, 64 L.Ed.2d 398 (1980)	7, 8, 9, 10, 12
Gregg v. Georgia, 428 U.S. 153 (1976)	12
Hamling v. United States, 418 U.S. 87 (1974) . . .	6
Ham v. South Carolina, 409 U.S. 524 (1973) . . .	6
Ristaino v. Ross, 424 U.S. 589 (1976)	6
Rowbotham v. State, 542 P.2d 610 (Okla. Crim. App. 1975), modified on other grounds, 428 U.S. 907 (1976)	7
Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135, cert. denied, 441 U.S. 967 (1979)	5, 10, 11
Smith v. State, 236 Ga. 12, 222 S.E.2d 308, (Ga.), cert. denied, 428 U.S. 910 (1976) . . .	7
State v. Simmons, 286 N.C. 681, 213 S.E.2d 280, 286 (1975)	7
State v. Wilson, 57 N.J. 39, 269 A.2d 153 (1970)	7
State v. Wilson, 30 Ohio St.2d 199, 283 N.E.2d 632 (1972)	7
Turner v. Commonwealth, 221 Va.____, 273 S.E.2d 36 (1980)	1, 8, 9, 11, 12
United States v. Johnston, 268 U.S. 220 (1925) . .	5
Witherspoon v. Illinois, 391 U.S. 510 (1968) . . .	2, 4, 5, 6

Other Authorities

28 U.S.C. § 1257(3) 1

§ 17-110.1(C) of the Code of Virginia (1950), as amended 11

§ 18.2-31(d) of the Code of Virginia (1950), as amended 3, 11

§ 19.2-264.2 of the Code of Virginia (1950), as amended 2, 11

§ 19.2-264.4 of the Code of Virginia (1950), as amended 2, 7, 8, 9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-6366

WILLIE LLOYD TURNER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Virginia is reported at 221 Va. ____, 273 S.E.2d 36 (1980).

JURISDICTION

The petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. Whether The Trial Court's Exclusion Of Venireman Samuel Cypress For Cause Violated This Court's Holding In Witherspoon v. Illinois, 391 U.S. 510 (1968), Thus Denying Him His Right To A Trial By A Fair And Impartial Jury In Violation Of The Sixth And Fourteenth Amendments To The Constitution Of The United States?

II. Whether §§ 19.2-264.2 And 19.2-264.4 Of The Code Of Virginia (1950), As Amended, Were Unconstitutionally Applied To The Actions Of Petitioner In Violation Of The Eighth And Fourteenth Amendments To The Constitution Of The United States?

STATEMENT OF THE CASE

On July 12, 1978, petitioner entered Smith Jewelers located in Franklin, Virginia at about 11:20 a.m. Using a sawed-off shotgun that had been wrapped in a green towel, petitioner silently motioned the various customers and employees to line up against the counter of one side of the store and forced the proprietor, W. Jack Smith, Jr., to stuff money from the cash register into some jewelry bags. (App. 149). While doing so, Smith was able to activate a silent alarm. Subsequently, a local police officer, A. D. Bain, Jr., came in and inquired as to why the alarm was on. (App. 153). Petitioner then forced Bain to give up his revolver to him, who picked it up while continuing to hold his shotgun in his right hand. Petitioner made the store owner turn the alarm off and fill up some more jewelry bags with store merchandise. (App. 155).

Petitioner then took the pistol from his pocket and put it in his right hand, switching the shotgun to his left hand. As he tossed the pistol, it discharged and a shot went towards

the back of the store. After Bain assured petitioner that no one was coming in the back, petitioner went to the middle of the room, "just looked at Mr. Smith and fired the [pistol] at" him, causing him to "yell like a puppy and [fall] to the floor . . .." (App. 156-57, 182). Medical testimony established that this first shot to Smith, while not the cause of his death, did produce injuries to his head and brain. (App. 230). Bain testified that petitioner had fired the shot at Smith from a distance of 12 to 15 feet and had "just pointed right at [him] and fired" without warning. (App. 242). At this point, Bain tried to reason with petitioner, who responded by saying: "I'm going to kill that nigger for squealing on me." (App. 161, 242-43). Petitioner then reached over the counter, looked down at the "gurgling" Smith, and shot him two times in the chest in a "rapid fire" manner. (App. 162). Bain was then able to subdue petitioner. Medical testimony demonstrated that each of these two shots would have been independently fatal. (App. 227-33).

On December 4, 1979, the petitioner was convicted by a jury of capital murder in the commission of a robbery in violation of § 18.2-31(d) of the Code of Virginia (1950), as amended. At the penalty stage of petitioner's trial, evidence was introduced that between September, 1970 and the date of petitioner's trial, he had incurred five felony convictions, all but one involving acts of violence. One was for second degree murder. Bain testified that petitioner did not appear

nervous while the robbery was in progress. App. 377). Petitioner's hands were not shaking when he fired the two shots to Smith's chest; he looked right over the counter rather than to see if anyone else was entering the store. (App. 379). Finally, a police officer testified that after petitioner had been subdued by Bain and was being handcuffed, he remarked, "I guess I'm on the way back." (App. 351). Subsequently, the jury recommended a sentence of death on December 6, 1979. The trial court then ordered a post-sentence report to be prepared and on February 6, 1980, the court affirmed the jury's recommendation, finding that the sentence was appropriate. Petitioner then appealed his conviction to the Supreme Court of Virginia, which accorded his case a priority status. On November 26, 1980, the Supreme Court of Virginia affirmed petitioner's conviction and held that the penalty imposed was neither excessive nor disproportionate.

ARGUMENT AGAINST GRANTING CERTIORARI

I. THE EXCLUSION FOR CAUSE OF VENIREMAN SAMUEL CYPRESS WAS CONSISTENT WITH THIS COURT'S HOLDING IN WITHERSPOON V. ILLINOIS.

Petitioner alleges that the exclusion of venireman Samuel Cypress for cause was done in contravention of this Court's holding in Witherspoon v. Illinois, supra, since his answers on voir dire did not clearly establish his absolute refusal to consider the imposition of a sentence of death regardless of the facts adduced in petitioner's trial.

Respondent submits that the Supreme Court of Virginia correctly applied Witherspoon in the case at bar. In Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135, cert. denied, 441 U.S. 967 (1979), the state Supreme Court found that the exclusion of a prospective juror in a capital punishment case is a mixed question of law and fact. In order to apply the rule of law that a venireman may be excluded for cause only if he is irrevocably committed against capital punishment, the trial court must first resolve the factual question. As a fact finder, the trial judge must weigh the meaning of the answers given in light of the phrasing of the questions posed, the inflections, tone and tenor of the dialogue, and the general demeanor of the prospective juror. 219 Va. at 464-65. A trial court that witnesses or conducts such an examination is clearly in a much better position to resolve this factual question than an appellate court, which has only a cold record upon which to make such a determination.

On appeal, the Supreme Court of Virginia upheld the trial court's conclusion that the responses of Cypress on voir dire demonstrated that he was irrevocably committed against the death penalty. Respondent would argue that the present contention regarding Cypress is essentially a factual allegation and in no way presents a previously undecided question of law. Thus, respondent submits that this is not the kind of question that would justify the granting of certiorari. See United States v. Johnston, 268 U.S 220 (1925).

Furthermore, on the merits of the exclusion of Cypress, the decision of the trial court that his responses, when considered in toto, showed his absolute aversion to the death penalty was fully justified. Petitioner complains of the way certain questions were phrased to Cypress by the trial court. For example, he alleges that the question: "Is your objection to the death penalty absolute?" was overly vague. Respondent submits that this question was reasonably designed to elicit from Cypress his attitudes regarding the imposition of capital punishment. In this regard, it must be remembered that this Court has often recognized that a trial court has wide discretion on voir dire, both in terms of its manner and its substance. A trial court is under no obligation to conduct a Witherspoon-related examination in any particular way. See generally Ristaino v. Ross, 424 U.S. 589 (1976); Hamling v. United States, 418 U.S 87 (1974); Ham v. South Carolina, 409 U.S 524 (1973).

Similarly, petitioner alleges that Cypress did not explicitly state his absolute refusal to consider the death penalty as a sentencing option. Respondent would contend that the juror's responses, when viewed in context, clearly demonstrated that he should be excluded for cause. Petitioner's tortured interpretation of Cypress' responses to the contrary, he can point to no answer on voir dire which in any way evinced a willingness on the part of the venireman to consider the imposition of death in petitioner's trial. When petitioner alleges

that certain responses manifested the juror's ambivalent attitude, he confuses lack of precision with ambivalence. When, asked if he could "in a proper case" impose the death penalty, he stated that he could not see "where it helps any," this can only be taken to mean an answer in the negative. While Cypress' answers may not have been "models of clarity," the Supreme Court of Virginia's conclusion that he was properly excluded is consistent with the approach of other state courts which undertake "a contextual consideration of the entire voir dire examination . . .." State v. Simmons, 286 N.C. 681, 213 S.E.2d 280, 286 (1975), modified on other grounds, 428 U.S 903 (1976). See also Rowbotham v. State, 542 P.2d 610 (Okla. Crim. App. 1975), modified on other grounds, 428 U.S. 907 (1976); Frith v. State, 325 N.E.2d 186 (Ind. 1975); Smith v. State, 236 Ga. 12, 222 S.E.2d 308, (Ga.), cert. denied, 428 U.S 910 (1976); State v. Wilson, 30 Ohio St.2d 199, 283 N.E.2d 632 (1972); State v. Wilson, 57 N.J. 39, 269 A.2d 153 (1970).

II. PETITIONER'S SENTENCE PURSUANT TO SECTION 19.2-264.4 OF THE CODE OF VIRGINIA WAS CONSISTENT WITH THIS COURT'S HOLDING IN GODFREY V. GEORGIA, ___U.S.___, 64 L.Ed.2d 398 (1980), AND WAS NOT A VIOLATION OF HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

On the basis of this Court's recent decision in Godfrey v. Georgia, supra, petitioner argues that his sentence is unconstitutional. He first appears to argue that the facts adduced in the case at bar were no more aggravated than those in Godfrey, thus invalidating the jury's finding "that his

conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." See § 19.2-264.4(C).

In response, respondent would argue that this again is essentially a factual argument respecting the proper application of a prior decision of this Court. As indicated in respondent's first argument, this is not an adequate ground for the granting of certiorari by this Court. Furthermore, as to the merits of this contention, respondent says that the facts in petitioner's case were much more egregious than those in Godfrey. As stated by the Supreme Court of Virginia, "Godfrey rested upon its unique facts." Turner v. Commonwealth, 273 S.E.2d at 44. Godfrey involved a Georgia statute substantively identical to Virginia's "vileness" aggravating circumstance. This Court considered whether "in light of the facts and circumstances of the murders that Godfrey was convicted of committing," the Georgia Supreme Court could constitutionally apply that state's own vileness provision so as to uphold the death penalty imposed. See ____U.S.____, 64 L.Ed.2d at 409. The defendant in Godfrey, who was suffering from severe marital difficulties, after having a heated argument with his wife over the telephone went to the trailer home where she was staying with her mother and daughter. There, he shot and killed instantly his wife and mother-in-law. At trial, the prosecutor conceded the absence of "torture" or "aggravated battery," thus leaving only "depravity of mind" as a remaining possibility. The trial

judge stated that there had been no physical harm or torture beyond the actual murders. He also found as a mitigating factor defendant's prior history of no significant criminal activity.

Respondent would argue that the Supreme Court of Virginia was thoroughly justified in determining that the facts in petitioner's case were sufficiently distinguishable to permit a conclusion that petitioner's conduct was "outrageously or wantonly vile, horrible or inhuman" and that he had committed an "aggravated battery." 273 S.E.2d at 45. First, unlike the defendant in Godfrey, who had no prior criminal record, petitioner's sentence rested on both of § 19.2-264.4(C)'s aggravating factors. He had an extensive and violent criminal history. Petitioner manifested much greater cold-bloodedness, brutality, and callousness than the defendant in Godfrey. Smith was shot and killed solely because he had activated the silent alarm, and not, for example, so that petitioner could effect his escape. The first shot was fired without warning. After a significant amount of time had elapsed, petitioner strode over to the counter, leaned over, and fired two bullets into the prone, helpless body of Smith. As Smith was slumped behind the counter, one customer heard him "gurgling." 273 S.E.2d at 45. Unlike the victims in Godfrey, Smith did not die instantaneously from a single discharge of a firearm, but rather he suffered a slow, painful death from at least three shots. Thus, the record establishes quite clearly

that petitioner's conduct was much more aggravated than that in Godfrey and shows that he had in fact committed an aggravated battery, which is defined in Virginia as a "battery which, qualitatively and quantitatively is more culpable than the minimum necessary to accomplish an act of murder." See Smith v. Commonwealth, supra, 219 Va. at 478.

Respondent would note that petitioner continues in this Court his erroneous, unsubstantiated characterization of petitioner as a would-be criminal who panicked when his robbery went awry. On the contrary, the evidence introduced at trial was that petitioner at no time appeared nervous and shot Smith in a deliberate, calculated fashion. (App. 377-79). There is absolutely no evidence supporting any insinuation that petitioner's state of mind at the time he killed Smith was remotely comparable to that of the defendant in Godfrey when he killed his family members.

Thus, respondent would argue that the facts in the case at bar were so egregious as "to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, supra, 64 L.Ed.2d at 409. The Supreme Court of Virginia quite properly upheld petitioner's sentence. Although the Georgia Supreme Court may have deviated from its past decisions in Godfrey, nothing of the sort occurred in the case at hand. The Virginia Supreme Court correctly determined that the evidence established that petitioner had committed an aggravated battery, as defined in

Smith v. Commonwealth, supra. Further, the Court conducted a review of petitioner's sentence on appeal in order to determine that it was not excessive or disproportionate to other cases prosecuted under § 18.2-31(d) and thus prevented the "standardless and unchanneled imposition of" a death sentence. In Turner, the Supreme Court of Virginia noted that petitioner's past criminal record was "one of the most extensive we have reviewed under Code Section 17-110.1(C)." 273 S.E.2d at 47. Only one other such defendant had previously been convicted of a murder. The state court also noted that while petitioner's murder had not risen to the level of atrociousness of several past decisions, it was just as brutal as the murders in Briley v. Commonwealth, 221 Va.____, 273 S.E.2d 48 (1980), and Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), cert. denied, 444 U.S. 1049 (1980).

In this regard, petitioner makes several arguments regarding the proper construction of § 19.2-264.2 on the basis of several Georgia decisions which supposedly have been incorporated into the comparable Virginia vileness provision. However, no such "incorporation" argument was presented to the Supreme Court of Virginia; therefore, this argument is not presently cognizable. This Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in the courts with the requirements of state law. See Edelman v. California,

344 U.S. 357 (1953). State courts should be given the first opportunity to consider the applicability of state statutes in light of constitutional challenges. See Cardinale v. Louisiana, 394 U.S. 437 (1969).

Finally, petitioner argues that his sentence was the result of "the uncontrolled discretion of a basically uninstructed jury." Godfrey v. Georgia, supra, 64 L.Ed.2d at 407. He argues that the jury was not given sufficient instructions regarding the term "aggravated battery" to enable it to construe said term in a constitutional manner. In Gregg v. Georgia, 428 U.S. 153 (1976), this Court stated with respect to Georgia's vileness statute: "[T]here is no reason to think the juries will not be able to understand it." Id. at 202 n.54. In any event, the term "aggravated battery", the factor which was found by the Supreme Court of Virginia to be shown by the evidence in Turner, was given further specificity in an instruction to the jury. Consistent with the state Supreme Court's previous limiting construction of this term, the jury was instructed that the aggravated battery had to be "beyond the minimum necessary to accomplish the act of murder." (App. 40). The jury's verdict similarly employed this language. (App. 5). Thus, respondent submits that the decision of the jury in the case at bar was done in adherence to specific instructions which insured that the jury would act in a constitutional way.

CONCLUSION

For the reasons presented, the respondent respectfully contends that the issues raised in this case are neither important nor substantial and that this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Robert H. Anderson, III, Assistant Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and on the 17th day of April, 1981, I mailed, with first class postage prepaid, a copy of the Respondent's Brief in Opposition to Granting of Writ of Certiorari to John C. Lowe, Esquire, Lowe, Gordon, Jacobs, & Redinger, Ltd., 409 Park Street, Charlottesville, Virginia 22901, counsel for petitioner.

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